LIBRARY
SUPREME COURT, U. S.

FILED
MAR 31 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1310

LEE EDWARDS,
Petitioner,

v.

LEM C. BRYAN, Receiver for Arkansas Loan and Thrift Corporation,
Respondent,

HOYT BORUM, AFTON BORUM, E. M. CLEM, GAYLORD B. ROBERSON, PAUL A. MITCHLER, RALPH C. INGRAM, ERNEST A. BARTLETT, JR., JOE D. JERYO, and CHARLES R. GARNER, Parties to Original District Court Action, and Parties to Companion Cases in Circuit Court of Appeals for the Eighth Circuit, Consolidated Therein for Trial,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

JOHN H. FITZHUGH
522 Merchants National Bank Building
Fort Smith, Arkansas

W. B. PUTMAN
P. O. Box 477
Fayetteville, Arkansas
Counsel for Respondent

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement of the case	2
Argument	5
The ultimate result in this litigation will be unchanged whether federal common law or Arkansas substantative law be applied	5
The holding of the United States Court of Appeals for the Eighth Circuit that the substantive law applicable to this case, an equity receivership, is the "federal common law" is not in conflict with the decisions of this Court, the United States statutory law, or the decisions of the Fifth and Ninth Circuits	7
The holding of the United States Court of Appeals for the Eighth Circuit vacating the judgment of the United States District Court for the Western District of Arkansas in favor of Petitioner and directing that judgment be entered for the Respondent against the Petitioner does not violate the Petitioner's right to a trial by jury under Amendment VII to the Constitution of the United States nor does it deprive him of his property without due process of law under Amendment V to the Constitution of the United States	10
Conclusion	14

TABLE OF AUTHORITIES CITED

Cases

Blanks v. American Southern Trust Co., 177 Ark. 832, 9 S.W.2d 310 (1928) 5, 6, 10, 13

Brady v. Southern Ry. Co., 320 U.S. 476, 479-480 (1943) 11

Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) 7, 8, 9

D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp., 315 U.S. 447 (1942) 7, 9

Ellis v. Jonesboro Trust Co., 179 Ark. 615, 17 S.W.2d 324 (1929) 5

Erie R. Co. v. Tompkins, 304 U.S. 364 (1938) 7, 10

Galloway v. United States, 319 U.S. 372 (1942) 10, 11

Helene Curtis Industries, Inc. v. Pruitt, 385 F.2d 841 (5th Cir. 1967) 10, 11

Los Angeles Trust Deed & Mortg. Exchange v. Securities and Exchange Commission, 285 F.2d 162 (9th Cir. 1960), cert. den. 366 U.S. 919 8

Riess v. C. W. Murchison, 384 F.2d 727 (9th Cir. 1967) 10

Sommerville v. United States, 324 F.2d 712 (3rd Cir. 1963), cert. den. 376 U.S. 909 (1964) 7, 8, 9

Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957) 8

Vanston Bondholders Protective Commission v. Green, 329 U.S. 156 (1946) 8

Constitutions

United States Constitution:

Amendment V 2, 10

Amendment VII 2, 10, 11

Statutes

United States Statutes:

15 U.S.C. 77e(a) 8

15 U.S.C. 77q(a) 8

15 U.S.C. 77t(b) 8

15 U.S.C.A. 77t(b), anno. 25 8

18 U.S.C. 1911 9

18 U.S.C.A. 1911 9

28 U.S.C. 41(1) 8

28 U.S.C. 959(b) 9

28 U.S.C.A. 959 9

Arkansas Statutes

Ark. Stat. Ann., Sec. 85-1-103 (Add. 1961) 6

Miscellaneous

R. Leflar, American Conflicts Law, Sec. 67 (1968) .. 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1310

LEE EDWARDS,
Petitioner,

v.

LEM C. BRYAN, Receiver for Arkansas Loan and Thrift Corporation,
Respondent,

HOYT BORUM, AFTON BORUM, E. M. CLEM, GAYLORD B. ROBERSON, PAUL A. MITCHLER, RALPH C. INGRAM, ERNEST A. BARTLETT, JR., JOE D. JERYO, and CHARLES R. GARNER, Parties to Original District Court Action, and Parties to Companion Cases in Circuit Court of Appeals for the Eighth Circuit, Consolidated Therein for Trial,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions below are adequately set forth in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Whether the holding of the United States Circuit Court of Appeals for the Eighth Circuit that the substantive law applicable to this case, an equity receivership, is the "federal common law," is in conflict with the laws of Arkansas, the decisions of this Court, the United States statutory law, and the decisions of the Fifth and Ninth Circuits.

Whether the holding of the United States Court of Appeals for the Eighth Circuit vacating the judgment of the United States District Court for the Western District of Arkansas in favor of the Petitioner and directing that judgment be entered for the Respondent against the Petitioner is violative of the Petitioner's right to a trial by jury under Amendment VII to the Constitution of the United States and a deprivation of property without due process of law under Amendment V to the Constitution of the United States.

STATUTES AND REGULATIONS INVOLVED

These are adequately set forth in the Petition with the exception of 18 U.S.C. 1911 set forth at page 9 of this brief and Ark. Stat. Ann., Sec. 85-1-103 (Add. 1961) set forth at page 6 of this brief.

STATEMENT OF THE CASE

This suit was filed by Lem C. Bryan, Receiver of Arkansas Loan and Thrift Corporation (hereafter AL&T), against the Petitioner and other named defendants seeking judgment on certain promissory notes executed by them in favor of AL&T, each in the amount of $70,400.00.

The Petitioner, along with the other named defendants, denied liability pleading failure of consideration, lack of delivery, the statute of frauds, and that the Respondent was not a holder of the notes. The Respondent alleged the Petitioner and the other named defendants had executed the notes for the purpose of deceiving the Insurance Commissioner of the State of Arkansas, and that they were estopped to deny their liability.

The Respondent would add to the statement of the facts contained in the Petition at page 5 the facts surrounding the investigation of both AL&T and Savings Guaranty Corporation (hereafter SGC) by the Insurance Commissioner of the State of Arkansas (hereafter Commissioner). In June of 1967, the Commisioner became concerned about the solvency of SGC and the possibility that there was such an interlocking ownership between AL&T and SGC that AL&T was in fact insuring its own deposits. He summoned the officers of the corporation to a hearing which was held on August 9, 1967. Four of the original defendants, the Petitioner not included, attended the hearing where it was stated by them that with the exception of 301 shares, the majority of the stock in SGC was held by its officers and directors. A memorandum on the letterhead of SGC was introduced in evidence at the hearing showing that each of the defendants below, including the Petitioner, was the owner of sixty-five shares of stock. It should also be noted that the stock records of SGC showed the Petitioner and his codefendants as owners of the shares in question.

The notes in question are all dated June 15, 1967, and are all admittedly signed by the defendants in this case, including the Petitioner. The notes all had attached to them a stock certificate for sixty-four shares of SGC stock, and except for the Petitioner herein, the endorsement on the back of the stock certificates are conceded to be genu-

ine. The notes are payable to AL&T and each recites that it is secured by sixty-four shares of the stock of SGC.

Further facts are as stated in the Petition at pages 5-12, and with the exception of the latter portion of paragraph 6, at page 8 of the Petition (which should be disregarded as argumentative and irrelevant) adequately sets forth the balance of the circumstances surrounding this litigation.

ARGUMENT

The Ultimate Result in This Litigation Will Be Unchanged Whether Federal Common Law or Arkansas Substantive Law Be Applied.

Regardless of the validity of the Petitioner's argument that there is no federal common law, this case would be decided in precisely the same manner whether the federal common law or Arkansas substantive law be applied. No matter what name be given the particular theory, estoppel or some form of implied consideration, the Arkansas Court has consistently required payment of such notes as these on the basis of the fiduciary relation of the maker and the payee. **Blanks v. American Southern Trust Co.**, 177 Ark. 832, 9 S.W.2d 310 (1928) found such a fiduciary relation and estopped the maker from asserting defenses on the note saying:

> . . . it was his duty as a director not to entertain such a promise and act upon it to the detriment of his bank.

There, a condition precedent to payment, similar to that argued by the Petitioner herein, was present and was not allowed as a defense. The court regarded the interlocking directorates of the bank and the borrowing company as an important element in their consideration. **Ellis v. Jonesboro Trust Co.**, 179 Ark. 615, 17 S.W.2d 324 (1929) found an implied consideration in order to hold the defendant liable on a note. These cases clearly support the finding of the United States Court of Appeals for the Eighth Circuit, set forth at page 19a of the Petition, that the decision reached was not in conflict with Arkansas law.

Further, the Petitioner's argument at page 25 of the Petition that the Uniform Commercial Code as adopted

in Arkansas supersedes the disallowance of the asserted defenses since the Respondent was not a holder is overcome by Ark. Stat. Ann. Sec. 85-1-103 (Add. 1961). This section reads as follows:

> Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating clause shall supplement its provisions.

Clearly this would allow the affirmative application of the estoppel doctrine to bar any assertion of those defenses allowed by the code sections relied upon by the Petitioner. The Petitioner can cite no cases arguing that the sections relied upon by him preempt the application of the equitable doctrine of estoppel for the reason that there are none. Further, there is no indication by either the code or the comments contained therein and cited by Petitioner that such a situation as this is governed by those sections. It is Respondent's contention that Ark. Stat. Ann. Sec. 85-1-103 (Add. 1961) clearly allows the application of the estoppel doctrine to this case.

The Petitioner further argues that, under Arkansas law, the Respondent as receiver for AL&T was not a holder in due course and can therefore stand in no better position than AL&T. The Respondent does not argue that he is or is not a holder for the reasons already stated. Such is not material or relevant to the questions before this Court. The sole question is the application of the estoppel doctrine to preclude the Petitioner from asserting certain defenses on a note admittedly signed by him. On this question the law is settled in Arkansas, **Blanks v. American Southern Trust Co.**, *supra*, and was found to be the same under the federal common law per the deci-

sion of the United States Court of Appeals for the Eighth Circuit, contained at page 19a of the Petition.

Thus Arkansas law does permit the application of the estoppel doctrine on these facts, and as such, a decision by this Court that the federal common law does not apply would not affect the ultimate result of this case. Where the question presented has no bearing on the ultimate outcome of the case, this Court has declined to grant certiorari. **Sommerville v. United States**, 324 F.2d 712 (3d Cir. 1963), cert. den. 376 U.S. 909 (1964).

The Holding of the United States Court of Appeals for the Eighth Circuit That the Substantive Law Applicable to This Case, an Equity Receivership, Is the Federal Common Law, Is Not in Conflict With the Decisions of This Court, the United States Statutory Law, or the Decisions of the Fifth and Ninth Circuits.

The Petitioner contends that the United States Court of Appeals for the Eighth Circuit has placed itself into conflict with the decisions of this Court and decisions of the Fifth and Ninth Circuits by holding that the federal common law still exists and is applicable to the facts of this case. But the primary case relied upon by the Petitioner, **Erie R. Co. v. Tompkins**, 304 U.S. 364 (1938), did not decree an end to all federal common law. Since the decision in **Erie R. Co. v. Tompkins**, *supra*, this Court has declared often that there is still a federal common law in the absence of specific federal statutes in point. **D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.**, 315 U.S. 447 (1942), finds a federal common law governing federal rights. **Clearfield Trust Co. v. United States**, 318 U.S. 363 (1943), specifically states that the **Erie Doctrine** does not apply where the rights and duties of the United States on commercial paper which it issues are involved. Jurisdiction in the Federal District Court in **Clearfield Trust**

Co. v. United States, *supra*, was pursuant to 28 U.S.C. 41(1), but the cause of action was on the "express guaranty of prior endorsements made by the Clearfield Trust Co." The rule to be derived from these cases is that where Congress has acted to allow jurisdiction without regard to either diversity or amount in controversy, such an action indicates a federal interest in the subject matter being regulated. See **Sommerville v. United States**, *supra*. In proper cases, federal general law (common law) will be allowed to fill the gaps in the regulatory and jurisdictional statutes. This has been the result in matter involving the administration of federal labor relations law (affecting interstate commerce) as in **Textile Workers v. Lincoln Mills**, 353 U.S. 448 (1957), and the application of the Federal Bankruptcy Act in **Vanston Bondholders Protective Commission v. Green**, 329 U. S. 156 (1946). Still more instances may be found in R. Leflar, **American Conflicts Law**, Sec. 67 (1968).

Respondent contends that the facts of this case warrant the application of a federal common law. The case arises under 15 U.S.C. 77t(b), 77v(a), 77e(a) and 77q(a) with the receiver being appointed pursuant to the powers authorized in 15 U.S.C. 77t. See **Los Angeles Trust Deed & Mortg. Exchange v. Securities and Exchange Commission**, 285 F.2d 162 (9th Cir. 1960), cert. den. 366 U.S. 919 annotated at 15 U.S.C.A. 77t(b), number 25. The specific sections of the Securities and Exchange Commission Act under which this receivership arose exemplify Congressional concern with the trading of securities. Through their Commerce power, Congress has expressed its desire and intent to regulate and control to the extent necessary to assure adequate safeguards for nationwide investors. It would seem anomalous indeed to impose federal regulations on the trading in the company's securities and the company's adequate registration yet fail to control portions of that trading and registration by federal law. The

interstate aspects of AL&T are clear. A solely local defense concerning the assets of a company in federal receivership, such receivership resulting from violations of and authorized by a federal law, would greatly diminish the effects of such law and would dilute the protection given to such interstate investors. See **Sommerville v. United States**, *supra*. Are we to look to one law to appoint a receiver and still another to determine defenses on actions arising out of such a receivership? Hopefully, this Court will follow its decision in **D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp.**, *supra*, and **Clearfield Trust Co. v. United States**, *supra*. Here there is a federal right arising from a federal law. Where the federal law is lacking, a federal common law should be applied.

The Petitioner also argues that Congress has spoken on this subject in 28 U.S.C. 959. However, the intent of this Act is readily inferred from the annotations in 28 U.S.C.A. 959(b) and those in 19 U.S.C.A. 1911. 18 U.S.C. 1911, pertaining to a receiver mismanaging property is set forth below.

> Whoever, being a receiver, trustee, or manager in possession of any property in any cause pending in any court of the United States, willfully fails to manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof, shall be fined not more than $3,000.00 or imprisoned not more than one year, or both.

The purpose is to establish the duties of a receiver, be he appointed by a federal court or a state court. 28 U.S.C. 959(b) places the duty upon the receiver to manage and operate such property in his possession according to the laws of the state, and 18 U.S.C. 1911 establishes his liabil-

ity for failure to do so. These sections do not determine what law is to govern transactions occurring prior to receivership or subsequent thereto that do not relate specifically to his liabilities and affirmative duties as a receiver. The litigation herein nowhere concerns the duties or liabilities of the receiver and Respondent nor does it arise from his duties or liabilities. Congress has not yet spoken upon this question.

However, as previously noted, even should state law be required to govern, there is no argument but that the Arkansas law relative to such an action would allow the recovery by the Respondent. **Blanks v. American Southern Trust Co.**, *supra.*

Further, the two cases asserted to be in conflict with the Eighth Circuit, **Helene Curtis Industries, Inc. v. Pruitt,** 385 F.2d 841 (5th Cir. 1967) and **Riess v. C. W. Murchison,** 384 F.2d 727 (9th Cir. 1967) are not appropriate counterargument to the Respondent's contentions. These cases do follow **Erie R. Co. v. Tompkins**, *supra*, but they were diversity actions and not therefore relevant for your consideration.

The Holding of the United States Court of Appeals for the Eighth Circuit Vacating the Judgment of the United States District Court for the Western District of Arkansas in Favor of Petitioner and Directing That Judgment Be Entered for the Respondent Against the Petitioner Does Not Violate the Petitioner's Right to a Trial by Jury Under Amendment VII to the Constitution of the United States Nor Does It Deprive Him of His Property Without Due Process of Law Under Amendment V to the Constitution of the United States.

Since **Galloway v. United States**, 319 U.S. 372 (1942), there has been little doubt that a Circuit Court of Ap-

peals may overturn a jury verdict and judgment entered thereon and direct that judgment be entered contra to such jury verdict and judgment without violating any Constitutional guarantees. See also **Brady v. Southern Ry. Co.**, 320 U.S. 476, 479-480 (1943). This court in **Galloway v. United States**, *supra*, at 389 said:

> If the intention is to claim generally that the Amendment (Amendment VII to the Constitution of the United States), deprives the federal courts of the power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century.

Here the directed verdict is sought by the party having the burden of persuasion and proof, but the Respondent contends that this, in the light of the facts herein, presents no Constitutional obstacle to the Eight Circuit order.

The test formulated and followed by most state and federal courts is that set forth in **Helene Curtis Industries, Inc. v. Pruitt**, *supra*, where at page 850 the test it:

> . . . a fact issue must be submitted to the jury if reasonable men could differ on the conclusions to be reached from the evidence presented.

The Petitioner argues that whether there was a "delivery" presented a fact question upon which reasonable men could differ and therefore it was improper for the Eighth Circuit to order that a judgment be entered against him in the light of the jury's verdict.

Both execution and delivery were admitted by the Petioner in his answer, and such is set forth in the Petition at page 9. The only question was whether the delivery of the notes to E. M. Clem was in fact a delivery to AL&T. Further, the Petitioner states that the delivery of the notes executed by the other defendants below was also

made to E. M. Clem. See Petition, page 8. The jury was instructed, over the objection of the Respondent, in Instruction Number 10 that:

> The plaintiff claims that each defendent is estopped to assert any defense to the plaintiff's right of recovery on any note executed by him. You are instructed that the doctrine of estoppel precludes one under certain circumstances from asserting a defense to the right of another to recover from him, and if you find from a preponderance of the evidence that each of the defendants intended to purchase stock of Savings Guaranty Corporation from Arkansas Loan and Thrift Corporation and pursuant to such intention executed the notes here sued on with intention that the transaction be consummated at some future date and that **these notes were delivered to Arkansas Loan and Thrift Corporation** and certain stock certificates of Savings Guaranty Corporation were issued in the name of each of the defendants; and you further find that on the basis of such transactions any agent, employee, officer, or director of either Arkansas Loan and Thrift Corporation or Savings Guaranty Corporation (in the course of an official investigation by the Arkansas Commissioner of Insurance as to whether Savings Guaranty Corporation was in compliance with the law) represented to the Commissioner of Insurance that each of the defendants was the owner of a certain specified number of shares of stock of Savings Guaranty Corporation, each defendant intended to purchase, then you are instructed that each of the defendants is estopped to assert any defense to the payment of any such note executed by him (emphasis added).

The instruction includes several elements necessary in order for the jury to find in favor of the receiver, Respondent herein, against any one of the defendants. But among

these elements is one common element, a common denominator so to speak, applicable to all defendants including the Petitioner. That is the requirement for delivery. The District Court jury entered a verdict against four of the defendants and in favor of six of the defendants. See Petition, page 7a. All ten defendants admitted execution of the note and delivery of the note to E. M. Clem. Clearly if delivery was the one element common to all ten, the jury's verdict against even one of the defendants necessarily implies a finding of the requisite delivery as to all. And, as set forth in the Eighth Circuit opinion, Petition page 19a, there was more than adequate evidence to support the finding that E. M. Clem was in fact and in law a director of AL&T at the time the note was executed and delivered to him by the petitioner.

The Petitioner's contention that there was no delivery as a matter of law is clearly obviated by the Petitioner's own argument, where at page 21 of the Petition, he asserts that "the possession by an agent of something belonging to his principal, would be the possession of the principal and not some third person." The Eighth Circuit opinion, at page 20a of the Petition, fully endorses this contention. Nor do we contend that a person cannot be an agent for more than one person at the same time. But the Petitioner's argument overlooks the obvious conclusion. That E. M. Clem was the agent of the petitioner is not disputed, but he was also the agent of AL&T and as such held these notes for that principal subject to the condition precedent specified in the testimony and argument of the Petitioner. Again, **Blanks v. American Southern Trust Co.**, *supra*, will not allow the assertion of such a condition precedent under circumstances as these to defeat recovery.

The Respondent further contends that in the light of the cited cases concerning estoppel, the delivery was not required. Delivery of the notes by itself, even construc-

tive delivery, is not a required element of estoppel. It would have been enough if the makers as directors or officers of AL&T or its intimate subsidiary, had simply kept the notes as part of some plan beneficial to the business and indirectly to them, so long as there was any way by which their companies or the public could suffer in the long run as a result of the making of the notes. This last proviso is merely another way of desribing the breach of fiduciary responsibility which the cases have penalized. Allowing the books of SGC to reflect the stock purchase would meet this test and would estop the makers from denying delivery.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted

JOHN H. FITZHUGH
522 Merchants National Bank Building
Fort Smith, Arkansas

W. B. PUTMAN
P. O. Box 477
Fayetteville, Arkansas
Counsel for Respondent

March 29, 1971